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No. 84-259

In the Supreme Court of the United States

OCTOBER TERM, 1984

KIPP ANDERSON, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that their removal from positions as air traffic controllers was improper because the President intruded on the authority of the employing agency.

1. The underlying facts are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation*, No. 84-78, another petition arising out of the air traffic controllers' strike.[1] Petitioners were among the more than 11,000 air traffic controllers who participated in a nationwide strike against the United States in 1981. Petitioners failed to heed an announcement by the President that those

[1]A copy of our response in *Campbell* has been sent to counsel for petitioners. This Court denied certiorari in *Campbell* on October 9, 1984. Another petition arising out of the air traffic controllers' strike is currently pending. *Schapansky* v. *Department of Transportation*, No. 84-258.

controllers who did not return to work would be removed,[2] and they were removed from their positions by the Federal Aviation Administration. Following their removal, petitioners appealed to the Merit Systems Protection Board, where they were afforded a hearing. The presiding official sustained their removal and the full Board affirmed (Pet. App. A64-A86, A40-A63). Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. Theirs were among nine appeals treated as "lead cases" by the court of appeals, while more than 3,000 other appeals were stayed pending the decisions in the lead cases. On May 18, 1984, a five-judge panel of the court of appeals issued eleven decisions in the nine lead cases, affirming the removal of petitioners (*id.* at A1-A12) and, with one exception, each of the other air traffic controllers whose claims were presented. See 84-78 Br. in Opp. 2-4.

The court of appeals rejected petitioners' claim that the President acted unlawfully, relying (Pet. App. A2) on its decisions in two of the other lead cases, *DiMasso* v. *Department of Transportation,* 735 F.2d 526 (84-258 Pet. App. 60a-64a), and *Schapansky* v. *Department of Transportation* (Pet. App. A19-A39). In *Schapansky,* the court concluded that "[t]he President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline" and that there was "no basis whatever" for the claim that "it was improper for the government to adopt a uniform policy of removing each employee whose participation in the illegal strike was

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[2]The President's announcement stated (Pet. App. A3-A4):

> I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated.

proven, or that the policy denied [the controllers] a full and meaningful opportunity to reply" (*id.* at A36, A38).[3]

2. Petitioners contend (Pet. 7-10) that the President's announcement that all striking controllers who did not return to their jobs would be removed invaded the personnel authority of the Federal Aviation Administration, which employed the controllers. This claim is plainly without merit.

It is well-settled that the President normally has the power to direct his subordinates in the performance of their duties as an incident of the executive power vested in him by Article II of the Constitution. See *Myers* v. *United States*, 272 U.S. 52, 135 (1926). In responding to the emergency created by the controllers' illegal strike, "the discretion to be exercised [was] that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it" (*id.* at 134). A dictum in *Myers* (*id.* at 135) suggests that the President's plenary power over his subordinates may be restricted where a statute specifically commits the performance of a duty to a particular officer or where "duties of a quasi-judicial character" are involved. Whatever the content of these exceptions, it is clear that they do not apply here.[4]

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[3]In *DiMasso*, the court relied on *Schapansky* in rejecting similar claims (735 F.2d at 528; 84-258 Pet. App. 63a-64a).

[4]We note that the President's decision was made after full consultation with the administrator of the FAA, the Secretary of Transportation and other high-ranking officials. Petitioners point to no evidence suggesting that the administrator would in fact have made a different policy determination on his own.

The provisions of the Civil Service Reform Act of 1978 cited by petitioners (Pet. 9), 5 U.S.C. 2302(c) and 7513, in no way purport to divest the President of authority over his subordinates. The Act itself grants the President broad powers over personnel management. See 5 U.S.C. 2301(c); S. Rep. 95-969, 95th Cong., 2d Sess. 19 (1978). Section 2302(c) simply makes the "head of each agency * * * responsible for * * * compliance with and enforcement of applicable civil service laws." The imposition of this duty cannot reasonably be read to divest the President of any authority.[5] Section 7513 requires that agencies take action against employees "only for such cause as will promote the efficiency of the [competitive] service," and specifies certain procedural rights of employees. Like Section 2302(c), its language will not bear a reading limiting the President's power in the manner petitioners contend. Nor is there anything in the legislative history of the Act that would suggest Congress harbored an intent to do so. See S. Rep. 95-969, *supra*, at 23, 50-51.

Petitioner's claim (Pet. 8) that the President invaded a quasi-judicial function is groundless. The decision to remove those who participated in the strike was in all respects a policy determination wholly within the President's power.[6]

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[5]Indeed, such a reading would lead to the anomalous result that heads of agencies within the Executive Branch who serve at the President's pleasure may operate free of presidential direction under the statutes that merely vest authority in them to manage the agencies and direct them to carry out their statutory duties.

[6]The right to quasi-judicial proceedings attaches only after adverse action has been taken. See 5 U.S.C. 7513. It was completely proper for the agency to have determined in advance of the individual hearings that it would remove those found to have participated in the strike. Pet. App. A38; *Pascal* v. *United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976).

By contrast, the President in no way participated in the inquiry into whether each air controller had engaged in the illegal strike. This inquiry was attended by full due process and statutory protections: the decisions were made by impartial officials following full hearings, and they have already been reviewed twice on appeal. Petitioners do not contest the court of appeals' conclusion that there was no interference with the hearing process.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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